Commissioner, Indiana Department of Environmental Management, Complainant
v.
Marie E. Heinold, 2002-12004-S, Respondent
2007 OEA 70 (06-S-E-3709)

TOPICS:
owner
operator
underground storage tanks
de novo review
summary judgment
enforcement
13-11-2-150(a)
Lovold
in use
storage
statutory construction

PRESIDING JUDGE:
Gibbs

PARTY REPRESENTATIVES:
IDEM: April Lashbrook, Esq.
Respondent: Robert A. Welsh, Esq., Harris Welsh & Lukmann

ORDER ISSUED:
May 18, 2007

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
IDEM filed for judicial review on June 15, 2007

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v.
Marie E. Heinold, 2002-12004-S, Respondent
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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
COMMISSIONER, INDIANA DEPARTMENT	)	
OF ENVIRONMENTAL MANAGEMENT	)	
Complainant	)	
	)	
v.	)	CAUSE NO. 06-S-E-3709
	)	
MARIE E. HEINOLD	)	
2002-12004-S	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court on the Motions for Summary Judgment filed by the Indiana Department of Environmental Management (IDEM) and Marie Heinold (the Respondent) and responsive pleadings thereto; and the Environmental Law Judge ("ELJ") having read and considered the petitions, motions, evidence, briefs, responses and replies of the parties, now finds that judgment may be made upon the record. The ELJ, being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

Findings of Fact

1. Raymond F. Heinold was the sole owner of the property located at 13205 Morse Street, in Cedar Lake, Indiana (the "Facility") from the 1970s until his death in December of 1985. (Respondent's Exhibit 1 - Affidavit of J. Keith Heinold[1] dated January 22, 2007)

2. From the mid 1970s until the death of Raymond F. Heinold in December of 1985, no gas station or related business involving the use, storage or sale of any gasoline or petroleum-based products or the use or operation of an underground storage tank system occurred at the Facility. (Respondent's Exhibit 1 - Affidavit of J. Keith Heinold dated January 22, 2007)

[1] J. Keith Heinold is Raymond and Marie's son.

3. Marie Heinold, the Respondent herein, inherited the Facility from Raymond F. Heinold and took title thereto by the final decree order of the Porter Superior Court in the Estate of Raymond F. Heinold on March 9, 1988. (Respondent's Exhibit 2 - Final Decree of Porter Superior Court, Estate No. 85-PSP-290 dated March 9, 1988).

4. Subsequent to the death of Raymond F. Heinold in December of 1985, no gas station or related business involving the use, storage or sale of any gasoline or petroleum-based products or the use or operation of an underground storage tank system occurred at the Facility. (Respondent's Exhibit 1 - Affidavit of J. Keith Heinold dated January 22, 2007)

5. Between August 9 and August 16, 1991, Hunts Excavating Sales and Service, Inc., at the direction of the Respondent, removed six (6) underground storage tanks (USTs) from the Facility. (Respondent's Exhibit 5 - Hunts Excavating Sales and Service, Inc. Tank Closure Worksheet dated August 19, 1991)

6. Approximately 500 gallons of waste liquid was removed from the USTs and disposed of. (IDEM's Exhibit E – Uniform Hazardous Waste Manifest)

7. On March 31, 2003, IDEM issued a Notice of Violation (the NOV) to Marie Heinold which set forth the following alleged rules violations: (1) failure to properly report, contain and respond to petroleum contamination under 327 IAC 2-6.1-7; (2) failure to report known contamination within 24 hours under 329 IAC 9-4-1(1); and (3) failure to begin corrective action under 329 IAC 9-4-3(2)(A).

8. On April 6, 2006, IDEM issued its Notice and Order of the Commissioner of the Department of Environmental Management (the CO) to Marie Heinold for failure to begin corrective action under 329 IAC 9-4-3-(2)(A), which assessed a penalty and ordered corrective action.[2] (Exhibit 14 - The Order of the Commissioner)

9. Marie Heinold timely filed her Petition for Administrative Review (Exhibit 15 - Respondent's Petition for Administrative Review)

10. The IDEM and the Respondent filed Motions for Summary Judgment on January 25, 2007. The IDEM filed its response on February 14, 2007. The Respondent filed its response on April 5, 2007.[3] The IDEM, thereafter, filed its reply on April 23, 2007. On May 1, 2007, oral argument was heard on both Heinold's and IDEM's Motions for Summary Judgment.

[2] The CO does not include the other 2 violations cited in the NOV. IDEM's counsel, in oral argument, confirmed that these violations have been dismissed.

[3] The Respondent did not receive the IDEM's Response. Therefore, by agreement of the parties and with the approval of the presiding Environmental Law Judge, the Respondent was granted an extension of time in which to file her response.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.

2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

3. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.;* I.C. 4-21.5-3-27(d). "*De novo* review" means that, "all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. The OEA may enter judgment for a party if it finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." IC 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.,* 725 N.E.2d 949 (Ind.Ct.App. 2000). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities,* 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996)."

5. The IDEM alleges that, as the owner of the USTs, the Respondent is liable for violations of 329 IAC. So, the first question that must be answered in the case is whether the Respondent is the "owner" of the underground storage tanks.[4] The definition of "owner" is found in Ind. Code § 13-11-2-150(a) and reads as follows:

[4] The parties stipulated at oral argument that the Respondent does not meet the definition of an "operator" under Ind. Code § 13-11-2-148(d).

"Owner", for purposes of IC 13-23 (except as provided in subsections (b) and (c)) means:

(1) for an underground storage tank that:
  (A) was:
    (i) in use on November 8, 1984; or
    (ii) brought into use after November 8, 1984;
    for the storage, use, or dispensing of regulated substances, a person who owns the underground storage tank; or
  (B) is:
    (i) in use before November 8, 1984; but
    (ii) no longer in use on November 8, 1984;
    a person who owned the tank immediately before the discontinuation of the tank's use

6. Pursuant to Indiana law, as established by the Indiana Appellate Court in the case of *Lovold Company v. Galyan's Brownsburg, Inc., Galyan's Family Market, Inc., and P&P Brownsburg Realty, Inc*., 764 N.E.2d 281(Ind. App. 2002), Heinold does not qualify as an "owner" under IC 13-11-2-150(a). The facts in *Lovold* are as follows:

   Galyan's Brownsburg, Inc. (GBI) acquired a parcel of real estate in 1963 which had a gas station and underground storage tanks for fuel on it. In 1970 they leased the property to the Almond Oil Company for ten years. During that time, Almond or its sublessees operated the gas station with its pumps and USTs. In 1980, Almond ceased operations, pumped out most of the gas from the USTs and removed the dispensing pumps. Thereafter, the property was no longer used as a gas station. It was used for other purposes, like a film developing shop. Three years later, in 1983, GBI was formally liquidated and dissolved with the Indiana Secretary of State issuing a "Certificate of Dissolution" on November 2, 1983. As a part of the liquidation, GBI sold the gas station property to Galyan's Family Market (Family Market). In November of 1984 Family Market sold the real estate to P & P Brownsburg Reality, Inc. (P & P). In 1985 P & P sold the real estate to Lovold. In 1995 it was discovered that petroleum was leaking from the USTs at the site and Lovold spent $150,000.00 to remediate the contamination.

   In December of 1995, Lovold filed suit against GBI, Family Market and P & P demanding contribution for the $150,000.00 spent for clean-up costs. Family Market and P & P filed summary judgment motions claiming entitlement to judgment because they were not "owners or operators" of the USTs. The trial court granted summary judgment on this basis to both Family Market and P & P. Lovold appealed this ruling. The Appellate Court sustained the trial court's summary judgment ruling on the issue of "ownership" stating:

> Additionally, it is apparent under the Act that neither Family Market nor P & P were ever "owners" for UST purposes. Specifically, neither corporation owned any of the USTs "immediately before the discontinuation of the tank's use" in accordance with I. C. § 13-11-2-150(a). Again, the undisputed evidence reveals that discontinuation of use occurred in 1980, before either of these corporations was formed or acquired the site. Inasmuch as neither Family Market nor P & P qualified as "owners" or "operators" of the USTs in accordance with the statutory definitions, neither of them is subject to any contribution claim liability under the Act. Thus, the trial court did not err in granting summary judgment in their favor.

7. The clear language of the statute and the *Lovold* case, *id.* require a conclusion that the Respondent is not the owner of the USTs at the Facility. The USTs were taken out of use sometime in the 1970s, prior to November 8, 1984. The Respondent took title to the Facility after 1985.

8. The IDEM argues that the USTs were "in use" because approximately 500 gallons of liquid were pumped out during the removal of the tanks from the ground and because the USTs were not closed in accordance with the rules found in 329 IAC 9-6. The IDEM's second argument is not persuasive as these rules were not adopted until 1992, a year *after* the tanks were removed. It is impossible for the Respondent to comply with rules before they are adopted.

9. The IDEM argues that the presence of the liquid in the tanks in evidence that the tanks were being used to store the material and were therefore, "in use". However, the word "storage" is not defined for purposes of Ind. Code § 4-13-23. Therefore, it is proper to look to the common definition of a word to determine its meaning. "The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004).

10. "Storage" is defined as a "space or place for storing". "Storing" means (1) to lay away or accumulate as in, store vegetables for winter use, an organism that absorbs and stores; (2) to furnish or supply especially: to stock against a future time, as in, store a ship with provisions; (3) to place or leave in a location (as a warehouse, library, or computer memory) for preservation or later use or disposal. "MERRIAM-WEBSTER ONLINE, at http://www.merriam-webster.com (May 11, 2007).

11. All of these definitions contemplate that "storage" implies a later use for the substance, not abandonment, as seems to be the case here. While the definition included storage for disposal, there is no evidence that the Respondent was aware that this substance was in the USTs. The IDEM did not submit any evidence that this liquid was usable or was being stored for disposal. The mere presence of the liquid in the USTs is not sufficient proof that the tanks were in use.

12. The IDEM also argues that the Respondent has signed several documents as the "owner" of the underground storage tanks. The IDEM does not argue either waiver or estoppel. ELJ must determine what the facts of this case are. The Respondent's mistaken belief that she was the owner of the USTs is not conclusive as to this fact.

13. There is no genuine issue as to a material fact and summary judgment is appropriate. As the Respondent is not the owner of the USTs, she cannot be held liable for the violations of Ind. Code § 13-23 nor 329 IAC 9. As this issue is conclusive, no other issues will be addressed.

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Respondent's Motion for Summary Judgment is **GRANTED** and the Indiana Department of Environmental Management's Motion for Summary Judgment is **DENIED.**

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 18th day of May, 2007 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge